IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Civil Second Appeal No.400/1999

Rajmal S/o Shri Chhitarmal ...plaintiff-appellant
Versus
Nizamuddin & another ...defendant-respondents
AND
Prabhudayal ...plaintiff-respondent

Date of Judgment ::: 5.7.2006

Hon'ble Mr. Justice Narendra Kumar Jain

Shri N.K. Maloo for the plaintiff-appellant
Shri Shiv Charan Gupta for defendant-respondents
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Heard learned counsel for the parties.

The plaintiff-appellant filed a suit for permanent injunction against the defendants for not interfering in the possession of the plaintiff's land measuring 60' x 60'. The defendant-respondents filed an application under Order 7 Rule 11 of the CPC for dismissal of the suit on the ground that it is barred by law as controversy in respect of the land in dispute had already been adjudicated vide judgment dated 5.5.1983 passed by the Munsiff Magistrate, Sawai Madhopur in Civil Suit No.23/69. The learned lower court allowed the application of the defendant-respondents and dismissed the suit of the plaintiff-appellant vide order dated 21.10.1991. Being aggrieved with the same the plaintiff-appellant preferred an appeal before the District Judge, Sawai Madhopur, who also dismissed the same vide impugned judgment dated 19.5.1998. Hence the present second appeal has been preferred by the plaintiff-appellant.

This court issued notices to show cause to the respondents vide order dated 21.9.2004 and in response to it, the respondents have put their appearance. The learned counsel for both the parties contended that looking to the short controversy involved in the present second appeal, the same may be disposed of at the admission stage itself, hence final arguments were heard in this second appeal and the same is being disposed of finally at admission stage itself.

After considering the submissions of the learned counsel for the parties I find that following substantial question of law is involved in this second appeal:-

> "Whether the order passed by the lower court on an application under Order 7 Rule 11 of the CPC on the basis of judgment dated 5.5.1983 can be allowed to be sustained particularly when the said judgment dated 5.5.1983 has already been set aside in appeal by the first appellate court."

The learned counsel for the appellant Shri N.K. Maloo, has made available a true photo stat copy of the certified copy of the judgment dated 9.1.1996 passed by the Civil Judge (Senior Division) Sawai Madhopur in regular first appeal no.23/91 (27/83) whereby the judgment and decree dated 5.5.1983 passed by the Munsif & Judicial Magistrate, Sawai Madhopur in Civil Suit No.23/69 was set aside. The copy of the judgment has been shown to the learned counsel for the respondents, who has not disputed the above facts and contended that in view of the judgment dated 9.1.1996 as referred by the learned counsel for the

appellant, the present appeal may be allowed and the case may be remitted back to the lower court for decision of the suit on merits.

I have considered the rival submissions and examined the judgment dated 9.1.1996 passed by the Civil Judge (Senior Division), Sawai Madhopur, in Civil Regular Appeal No.23/1991 (27/83). I have also examined the impugned judgment dated 19.5.1998 passed by the District Judge, Sawai Madhopur in appeal No.85/1991 as well as the order dated 21.10.1991 passed by the Munsif & Judicial Magistrate, Sawai Madhopur in Civil Suit No.216/1991, whereby the present suit of the plaintiff-appellant was dismissed while accepting the application of the defendant-respondents filed under Order 7 Rule 11 of the CPC. From the perusal of the order dated 21.10.1991 it is clear that the present suit was dismissed by the lower court on the basis of the judgment dated 5.5.1983 passed by the Munsif Magistrate, Sawai Madhopur, in Civil Suit No.23/69. Admittedly the judgment and decree dated 5.5.1983 had already been set aside by the first appellate court vide judgment dated 9.1.1996 as referred above. In these circumstances it is clear that the very basis of passing of judgment dated 5.5.1983 does not exist and as such the above substantial question of law formulated in this second appeal is to be answered in favour of the plaintiff-appellant.

In view of the above discussion I allow this second appeal and set aside both the impugned orders dated

19.5.1998 as well as 21.10.1991 passed by both the courts below and remit the case back to the Munsiff & Judicial Magistrate, Sawai Madhopur, to try and dispose of the suit no.216/91 on merits in accordance with the provisions of law.

The office is directed to send back the record of the courts below immediately. Both the parties are directed to appear before the lower court on 21st of August, 2006. There shall be no order as to costs.

(Narendra Kumar Jain) J.

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